

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP MADISON, JR.,

Defendant-Appellant.

UNPUBLISHED

May 9, 1997

No. 191256

Recorder's Court

LC No. 95-003210

Before: McDonald, P.J., and Reilly and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his waiver trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to a term of twenty to forty years' imprisonment for the second-degree murder conviction, a sentence which was enhanced pursuant to MCL 769.13; MSA 28.1085, because it was defendant's fourth felony conviction. The trial court also sentenced defendant to the mandatory term of five years for the felony firearm conviction because it was defendant's second conviction of that nature.

Defendant first claims on appeal that the evidence presented at trial was insufficient to sustain his conviction of second-degree murder. In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 525; 489 NW2d 748 (1992). The essential elements of second-degree murder are that a death occurred, that it was caused by the defendant, that the killing was done with malice, and that the killing was without justification or excuse. *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992).

Defendant specifically argues that he should have been convicted only of voluntary manslaughter because the facts of the case demonstrate that he committed the crime in the heat of passion upon adequate provocation. We disagree. The commission of a killing in a sudden heat of passion caused by adequate legal provocation are mitigating circumstances which will reduce a degree of homicide to manslaughter. *People v Jones*, 151 Mich App 1, 4; 390 NW2d 189 (1986). Adequate provocation is that which would cause one to act out of passion rather than due deliberation and reflection. *Id.* at 3.

We find that the record is devoid of any indication that defendant was adequately provoked such that he committed the instant offense in the heat of passion. The facts adduced at trial showed that defendant's estranged wife was driving a friend's car with three other passengers to one of the passenger's homes. One of defendant's wife's lady friends was in the passenger seat, and two of their gentlemen friends were in the backseat. As defendant's wife was stopped at a traffic signal at an intersection, defendant arrived at the same intersection. Defendant made a left turn, and pulled his car alongside his wife's car, so that the driver's side windows of each of the cars were facing each other at a distance of about two or three feet. It is unclear whether defendant and his wife exchanged words. Defendant then immediately pointed a handgun out of his window and towards his wife. His wife accelerated and made a right turn as defendant shot the gun. The bullet struck the gentleman in the back seat on the driver's side of defendant's wife's car and the man later died. Defendant then made a U-turn and chased his wife at a high rate of speed until she ultimately got away from him.

There is no evidence that defendant was adequately provoked such that he committed the crime in the heat of passion. We do not think that the sight of defendant's estranged wife in a car with three other people can be considered adequate provocation such that it would cause one to act out of passion rather than with due deliberation and reflection. Thus the evidence sufficiently supports the trial court's finding that defendant was guilty of second-degree murder.

Defendant also claims that the trial court erred in finding that there was bad blood between himself and his wife. We will not set aside a trial court's findings of fact on appeal unless they are clearly erroneous. *People v Kang*, 209 Mich App 540, 550; 531 NW2d 806 (1995). There was testimony at trial that defendant and his wife were separated at the time of the offense. We think it was a reasonable inference from this fact that there were some hard feelings between defendant and his wife. We do not think that the trial court's finding was clearly erroneous.

Finally, defendant argues that he is entitled to a new trial because the trial court did not advise him on the record that he had a constitutional right to a trial by jury. MCR 6.402(B) provides:

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

Our review of the record reveals that the trial court adequately complied with the above court rule. The trial court did advise defendant that he had a right to a jury trial, and the court properly ascertained that defendant understood his right and voluntarily waived that right. See *People v Reddick*, 187 Mich App 547, 549-550; 468 NW2d 278 (1991). We find no error.

Affirmed.

/s/ Gary R. McDonald
/s/ Maureen Pulte Reilly
/s/ Peter D. O'Connell